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Straddling the Fence Between Truth and Pretense: The Role of Law and Preference in Judicial Decision Making and the Future of Judicial Independence

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PANEL

STRADDLING THE FENCE BETWEEN TRUTH AND PRETENSE: THE ROLE OF LAW AND PREFERENCE IN JUDICIAL DECISION MAKING AND THE FUTURE OF JUDICIAL INDEPENDENCE†

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In this Essay, I begin by describing two contrasting models of judicial decision making. The traditional, law-based model posits that judges, if left to their own devices, will do their best to uphold the rule of law, and to that end, judicial independence is necessary to protect the decisions they make from external interference. The emerging, preference-based model, on the other hand, posits that independent judges exploit their independence by implementing their personal attitudes or values with no particular regard for the rule of law. I will then explain how contemporary debates on such issues as judicial selection, the regulation of judicial speech, the optimal rules for judicial disqualification, and the general relationship between judicial independence and accountability are animated by these contrasting models of judicial decision making. I accept a widely shared, common sense view that the dichotomy between law-based and preference-based models is a false one, in that law and preferences both play a role in judicial decision making. I argue, however, that the legal establishment has been reluctant to depart from the script of the law-based model for fear that doing so will undermine the primary justification for independence (by conceding that independent judges do more than simply follow the law when they decide cases). I argue that there may be other justifications for judicial independence that ought to hold sway in a world where judicial decision making involves a complex interplay between law and

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preference—justifications that liberate judges and lawyers to speak more candidly about the role preferences play in judicial decision making without conceding the need to curtail judicial autonomy in untoward ways. If we can move toward a broader consensus on what judges do when they decide cases, it may enable more meaningful engagement on such issues as judicial selection, speech, disqualification, independence, and accountability.

I. THE TRADITIONAL VIEW: LAW-BASED DECISION MAKING

The role of the judge, as traditionally conceived, is discrete and limited. Federal and state constitutions separate and circumscribe judicial power: legislators make laws; governors execute laws; judges interpret laws. If judicial power is not separated from legislative, wrote Montesquieu, "the life and liberty of the subject would be exposed to arbitrary control; for the judge would be then the legislator."[1] If judicial power is not separated from executive, he continued, "the judge might behave with violence and oppression."[2]

Judicial power, so separated and circumscribed, makes it "emphatically the province and duty of the judicial department to say what the law is," to borrow Chief Justice John Marshall's well-worn phrase.[3] To ensure that judges say what the law is, rather than what others in a position to control the judge want the law to be, conventional wisdom dating back to the founding posits that judges should possess a measure of independence from the other branches of government and the people they represent.[4] If they are insulated from external sources of interference with their impartial judgment, the traditional argument goes, otherwise capable and honorable judges will uphold the rule of law.

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1. BARON DE MONTESQUIEU, THE SPIRIT OF THE LAWS 152 (Thomas Nugent trans., Hafner Publishing 1949) (1748).

2. *Id.*

3. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

4. THE FEDERALIST NO. 78, at 466 (Alexander Hamilton) (Clinton Rossiter ed., 1961). Hamilton argued:

> The complete independence of the courts of justice is peculiarly essential in a limited Constitution. By a limited Constitution, I understand one which contains certain specified exceptions to the legislative authority. . . . Limitations of this kind can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void.

Id.

Today, this traditional understanding of the judicial role, in which independent judges uphold the rule of law through the exercise of impartial judgment, is reaffirmed by the oath of office that federal and state judges take: federal judges, for example, must swear to "faithfully and impartially discharge and perform all the duties incumbent upon [them] as [judges] under the Constitution and laws of the United States."[5] Moreover, at the state level, it is enforced through codes of conduct that judges ignore on pain of discipline or removal. Rule 1.2 of the 2007 Model Code of Judicial Conduct declares that a judge "shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary . . . ."[6] Rule 2.2 provides that judges "shall uphold and apply the law, and shall perform all duties of judicial office fairly and impartially."[7] A comment accompanying Rule 2.2 explains that, "[a]lthough each judge comes to the bench with a unique background and personal philosophy, a judge must interpret and apply the law without regard to whether the judge approves or disapproves of the law in question."[8] Rule 2.4(A) states that a judge "shall not be swayed by public clamor or fear of criticism," while Rule 2.4(B) states that "a judge shall not permit family, social, political, financial, or other interests or relationships to influence the judge's judicial conduct or judgment."[9]

The norms embedded in the oath of office and codes of conduct pervade our political culture and conjure the image of judges as detached and neutral arbiters of rules in contests between combatants—an image perpetuated with the metaphor of judge as umpire or referee. As Chief Justice John Roberts explained during his confirmation testimony: "Judges are like umpires. Umpires don't make the rules; they apply them."[10] And in 1998, Justice John Paul Stevens employed the umpire metaphor in defense of judicial independence, when he told a Chicago audience that:

> The thousands and thousands of Cub fans who have repeatedly visited Wrigley Field undoubtedly know much more about the rules of baseball and the ability of National League umpires to apply them fairly than most voters know about the law and the qualifications of judges of the Cir-

5. 28 U.S.C. § 453 (2000).
6. MODEL CODE OF JUDICIAL CONDUCT R. 1.2 (2007).
7. *Id.* 2.2.
8. *Id.* cmt.
9. *Id.* 2.4.
10. David G. Savage, *Roberts Sees Role as Judicial "Umpire,"* L.A. Times, Sept. 13, 2005, at A1.

> cuit Court of Cook County. Nevertheless, I think you would agree that the home-team fans should not have the opportunity to hire and fire umpires.[11]

II. THE EMERGING VIEW: PREFERENCE-BASED DECISION MAKING

The legal realism movement of the 1920s challenged the traditional view that judges were essentially value-neutral automatons who mechanically divined and applied the true meaning of the law. Rather, legal realists asserted that judges are influenced by their education, upbringing, ambitions, experiences, and values to no less an extent than anyone else.[12] And they sought to debunk the notion that law is somehow transcendental and therefore inherently known or knowable.[13]

In the years since, political scientists have elaborated upon the judicial role as first described by the realists. One highly influential cohort—devotees of the so-called "attitudinal model"—maintains that law is functionally irrelevant to judges who "make decisions by considering the facts of the case in light of their ideological attitudes and values."[14] From the perspective of the attitudinalist then, an ironic consequence of judicial inde-

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11. Molly McDonough, *U.S. Justice No Fan of Picking Judges by Ballot*, CHI. DAILY L. BULL., Sept. 17, 1998, at 1, 22.

12. Max Radin, The Theory of Judicial Decision: Or How Judges Think, Address Before the San Francisco Bar Association (1925), *reprinted in* AMERICAN LEGAL REALISM 195, 196 (William W. Fisher III et al. eds., 1993). Radin argues:

> Judges, we know, are people. I know a great many. Some were my school-mates . . . . They eat the same foods, seem moved by the same emotions, and laugh at the same jokes. Apparently they are a good deal like ourselves. If, therefore, in a controversy in which we are engaged, we could rid ourselves of the personal interest in it, we might shrewdly guess that a great many judges would like to see the same person win who appeals to us.

Id.

13. Jerome Frank, *Law and the Modern Mind* (1930), *reprinted in* AMERICAN LEGAL REALISM, *supra* note 13, at 205, 206–07. Frank writes:

> Myth-making and fatherly lies must be abandoned—the Santa Claus story of complete legal certainty; the fairy tale of a pot of golden law which is already in existence and which the good lawyer can find, if only he is sufficiently diligent; the phantasy of an aesthetically satisfactory system and harmony, consistent and uniform, which will spring up when we find the magic wand of rationalizing principle.

Id.

14. JEFFREY SEGAL & HAROLD SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL 73 (1993).

pendence is to undermine the rule of law by liberating judges to implement their personal preferences without fear of reprisal.[15]

A second group, sometimes loosely characterized as "neo-institutionalists,"[16] use the attitudinal model as a starting point, but add that judges are influenced by more than their political attitudes: some posit that judges think strategically when deciding cases (by, for example, taking what the legislators or governors will think into account);[17] others argue that judges are influenced by historical, legal, and political culture, which constrains the values judges implement and shapes what those values are;[18] still others argue that judges are influenced by their various audiences, such as colleagues, lawyers, media, legislators, voters, and so on.[19] While many scholars falling within the neo-institutionalist camp acknowledge the relevance of law to judicial decision making, they reject the traditional view that law is the sole or even a primary determinant of judicial behavior.

In short, attitudinalists characterize judicial decision making as preferences animated by personal values. The neo-institutionalists characterize it as preferences driven by values-plus (strategic thinking, cultural or historical norms, audiences the judge seeks to impress, and so on). Either way, however, it is judicial preferences rather than law that better explains case outcomes.

There are signs that preference-based models of judicial decision making are winning acceptance outside of academia. When the media report on key decisions of state and federal supreme courts, it has become common if not conventional to explain the decision with explicit reference to the political or partisan orientation of the judges in the majority and minority—often before reporting on the court's legal reasoning. The implication is obvious enough: whether the judge's political preferences are conservative or liberal is as, if not more, important to

15. *Id.* at 69 ("Members of the Supreme Court further their policy goals because they lack electoral or political accountability, ambition for higher office, and comprise a court of last resort that controls its own jurisdiction.").

16. *See* Howard Gillman and Cornell Clayton, *Beyond Judicial Attitudes: Institutional Approaches to Supreme Court Decision-Making, in* SUPREME COURT DECISION-MAKING: NEW INSTITUTIONALIST APPROACHES 1, 6–7 (Cornell W. Clayton & Howard Gillman eds., 1999).

17. *See* LEE EPSTEIN & JACK KNIGHT, THE CHOICES JUSTICES MAKE 18 (1998).

18. *See generally* THE SUPREME COURT IN AMERICAN POLITICS: NEW INSTITUTIONALIST INTERPRETATIONS (Howard Gillman & Cornell Clayton eds., 1999); Rogers M. Smith, *Political Jurisprudence, the "New Institutionalism," and the Future of Public Law*, 82 AM. POL. SCI. REV. 89 (1988).

19. LAWRENCE BAUM, JUDGES AND THEIR AUDIENCES 25–49 (2006).

understanding why a judge made a particular decision as the reasons the judge gave for making that decision.

On a related front, the ongoing campaign against "judicial activism" is driven by a suspicion that underlies the attitudinal model: independent judges disregard the law and implement their personal values. Such sentiments have begun to gain traction among the general public, as reflected in polling data showing majority support for the proposition that judicial activism has reached a crisis point and that, while judges say they are following the law, they often base decisions on their feelings.[20] At the same time, however, the campaign against activist judges underscores the tenacity of the traditional model, albeit in a backhanded way. To the extent that judges engage in preference-based decision making that is disconnected from the law, it is not perceived as business as usual, as political scientists posit. Rather, it is a "crisis" in immediate need of a solution that typically calls for the imposition of greater external controls on judicial decision making.

III. The Decision-Making Models and Their Relationship to Ongoing Debates over the Regulation of Judges and the Judiciary

At bottom, the seemingly disparate and intractable debates over the optimal method of judicial selection, the propriety of restrictions on judicial speech, the future of judicial disqualification, and, more generally, the striking of a proper balance between judicial independence and accountability are closely linked to a fundamental disagreement over which model of judicial decision making—the law-based model or the preference-based model—better describes what judges do.

A. *Judicial Selection*

The contemporary debate over judicial selection is about many things, but at its core the issue of whether to appoint or elect judges turns on whether independent judges can be trusted to follow the law.[21] Traditionalists who trust judges to follow the

20. Martha Neil, *Half of U.S. Sees "Judicial Activism Crisis,"* ABA J. E-Report, Sept. 30, 2005.

21. This was not always so. Scholars who have studied the judicial election movement of the mid-nineteenth century found that the movement was spearheaded by lawyers in state constitutional conventions who believed that elections would promote judicial independence by ending the dependence of judges on the governors or legislators who appointed them. *See* Kermit L. Hall, *Progressive Reform and the Decline of Democratic Accountability: The Popular Election of State Supreme Court Judges, 1850–1920,* 1984 Am. B. Found. Res. J. 345, 347–48;

law typically favor appointive systems which distance judges from the majoritarian influence of elections. Those who do not—either because they worry that too often judges will go rogue unless they are held accountable to the electorate, or because declaring what the law is is an expression of policy preference that voters in a democratic republic have a right to influence—typically favor judicial elections.[22]

B. *Restrictions on Judicial Speech*

Republican Party of Minnesota v. White held that judicial candidates have a First Amendment right to announce their views on disputed legal issues that may come before them later as judges.[23] The decision has emboldened interest groups to draft questionnaires for judicial candidates that ask the candidates for their views on issues such as abortion, gay marriage, capital punishment, and gun control.[24] Those who applaud these developments argue that the value-based preferences of judicial candidates are highly relevant to the decisions they will make as judges, and thus voters have both a right and a need to know them. *White* critics, on the other hand, subscribe to the traditional view and argue that the judge's personal views are irrelevant to what the law demands; moreover, from their perspective, judges who take firm positions on issues that will come before them later impliedly commit to deciding those cases in a manner consistent with their previously stated preferences, which is antithetical to the principle that judges must remain open minded and follow the law on a case-by-case basis.

Caleb Nelson, *A Reevaluation of Scholarly Explanations for the Rise of the Elective Judiciary in Antebellum America*, 37 AM. J. LEGAL HIST. 190, 224 (1993). In the current debate, however, election proponents focus upon accountability to the electorate and not independence from the political branches. *See, e.g.*, James Bopp, Jr., *Preserving Judicial Independence: Judicial Elections as the Antidote to Judicial Activism*, 6 FIRST AMEND. L. REV. 180 (2007) (focusing on the policy-making role of judges); Melinda Gann Hall, *Competition as Accountability in State Supreme Court Elections*, *in* RUNNING FOR JUDGE 165, 166 (Matthew J. Streb ed., 2007).

22. I do not want to overstate the point. There are others—most notably, elected judges—who make other arguments in support of judicial elections: electing judges adds to the judiciary's institutional legitimacy and thereby promotes public confidence in the courts, elections bring judges closer to the people they serve, and elections are how we select public officials in a democracy.

23. Republican Party of Minn. v. White, 536 U.S. 765, 781–82 (2002).

24. Deborah Goldberg, *Interest Group Participation in Judicial Elections*, *in* RUNNING FOR JUDGE, *supra* note 21, at 73, 84.

C. *Judicial Disqualification*

Under English common law, courts did not recognize disqualification for bias—let alone the appearance of bias. Judges had taken an oath to uphold the law impartially, and for a judge to concede disqualifying bias in a given case was tantamount to conceding an inability to honor his oath.[25] As one commentator wrote in 1947: "Disqualification for bias represents a complete departure from common law principles."[26] Over the course of the twentieth century, however, the realist suspicion that judges are susceptible to the same prejudices that afflict the rest of us gradually led to an expansion of disqualification rules and culminated in the ABA's promulgation of the 1972 Model Code of Judicial Conduct, which required disqualification not only for bias, but also for apparent bias (whenever a judge's "impartiality might reasonably be questioned").[27] The realist sentiments underlying the 1972 disqualification rule do not lead inexorably to the conclusion that judges who may be influenced by their value preferences are unable to be fundamentally fair and impartial but do point toward a realization that such judges can be overtaken by their preferences and become fundamentally unfair and partial. Despite nearly universal adoption of the ABA standard in the years since, many judges cling to the traditional view and remain highly ambivalent about conceding bias or apparent bias,[28] which has given rise to several recent, highly publicized episodes in which judges have declined to disqualify themselves in the teeth of widespread criticism. The most notorious example, perhaps, is Supreme Court Justice Antonin Scalia's refusal to disqualify himself from hearing a case in which Vice President Dick Cheney was a party, after accepting an invitation to go duck-hunting with the Vice President while the case was pending.[29]

D. *The Judicial Independence-Accountability Debate*

Ultimately, then, much depends on the empirical question of what it is that judges do. In a recent paper, David Pimentel argues that how much structural independence a state should give its judges—and correspondingly how much structural con-

25. WILLIAM BLACKSTONE, 3 COMMENTARIES *361.

26. John P. Frank, *Disqualification of Judges*, 56 YALE L.J. 605, 618–19 (1947).

27. MODEL CODE OF JUDICIAL CONDUCT Canon 3(C)(1) (1972).

28. JEFFREY M. SHAMAN & JONA GOLDSCHMIDT, JUDICIAL DISQUALIFICATION 1–2 (1995).

29. Cheney v. U.S. Dist. Court for D.C., 541 U.S. 913, 914, 929 (2004) (memorandum of Scalia, J.).

trol it should exert over those judges—is not an issue to be resolved in the abstract, but is one that turns on how judges in that state conduct themselves.[30] A judiciary that is typified by "monsters" who would subvert the rule of law must be controlled with limited concern for its independence; a judiciary whose judges are corruptible or well intentioned but still susceptible to misbehavior must be given the structural independence needed to do the right thing without inappropriate interference, while reserving the accountability stick for judges who stray; finally, a judiciary populated with "heroes" who will resist outside pressure as well as the temptation to follow a personal agenda can safely be afforded a high degree of structural independence with only limited concern for accountability.[31] The traditional, law-based model of judicial decision making in the United States features a more optimistic appraisal of what judges do. It calls for more structural independence and less structural accountability than preference-based models do, which posit that independence begets lawlessness that states might logically seek to control.

IV. IN SEARCH OF A MIDDLE GROUND BETWEEN LAW-BASED AND PREFERENCE-BASED MODELS

The law-based and preference-based decision-making dichotomy, while useful to understanding the tensions that pervade the regulation and oversight of judicial systems, is grossly exaggerated if not downright false. To say that law is utterly irrelevant to judges and judicial decision making, as some political scientists do, is to fixate (as most attitudinal studies do) on the eighty hotly-contested, policy-driven cases the Supreme Court of the United States decides each year to virtual exclusion of the other one hundred million cases filed across the United States, where claims that "the law constrains nothing" are exceedingly difficult if not impossible to defend. And as several academic lawyers (myself included) have argued, preference-based, attitudinal studies can often be faulted for defining and operationalizing "law" in unjustifiably limited ways.[32] Constrained definitions of law may serve to disprove law's relevance to judicial decision

30. David Pimentel, *Beyond and Beneath "Independence" and "Accountability": Adapting Judicial Structure to Leverage Judges' Courage and Integrity*, 56 CLE. ST. L. REV. (forthcoming 2008).

31. *Id.*

32. CHARLES GARDNER GEYH, WHEN COURTS AND CONGRESS COLLIDE 279–82 (2006); Stephen B. Burbank & Barry Friedman, *Reconsidering Judicial Independence*, *in* JUDICIAL INDEPENDENCE AT THE CROSSROADS 9, 24–26 (Stephen B. Burbank & Barry Friedman eds., 2002); Barry Friedman, *Taking Law Seriously*, 4 PERSPECTIVES ON POLITICS 261 (2006); Michael Gerhardt, *Attitudes About Atti-*

making (by making "law" a clearly, if narrowly, defined variable, the limited scope of which marginalizes its impact on judicial decisions relative to extra-legal considerations), but do so at the expense of ignoring the flexibility and nuance of the "law" as it is commonly understood and employed by judges and lawyers. Thus, proponents of preference-based models may fairly be accused of not taking law seriously enough.

The legal establishment, on the other hand, may just as fairly be criticized for taking law too seriously by clinging to and proselytizing the fiction that judicial decision making can be explained with reference to law alone. In an age when "[w]e are all legal realists now,"[33] it is too late in the day to pretend that when judges adjudicate disputes between adversaries, both of whom support their positions with credible-seeming legal arguments, the value preferences of the judges never factor into the choices they make. Attitudinal studies can be faulted, but they furnish compelling evidence that judicial value preferences matter.

All of which is to say that Barry Friedman probably got it right when he wrote: "[M]ost likely there is agreement that attitudes and law both play a role—the question is how much, and more particularly, how much law can constrain. To state this differently, the question is not so much whether law plays a role, as what role it plays."[34] The disputants, however, remain unwilling to meet halfway. Friedman himself has ably critiqued the "almost pathological" reluctance of some political scientists to take law seriously.[35] Of more immediate interest and concern to me, however, is why judges remain comparably reluctant to take extra-legal influences on judicial decision making seriously.

At some level, every law student, lawyer, and judge understands that a judge's values can influence the choices that a judge makes and that judicial decision making cannot always be explained with reference to legal doctrine alone; indeed, Judge Patricia Wald has characterized the legal profession's reactions to the findings of political science studies as "ho-hum."[36] But when judges take to the podium to defend judicial independence, discuss its relationship to the rule of law, and explain the role

tudes, 101 MICH. L. REV. 1733 (2003) (reviewing JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED (2002)).

33. Joseph William Singer, *Legal Realism Now*, 76 CAL. L. REV. 465, 467 (1988).

34. Friedman, *supra* note 32, at 264.

35. *Id.*

36. Patricia Wald, *A Response to Tiller and Cross*, 99 COLUM. L. REV. 235, 236 (1999).

judges play in the administration of justice, the party line remains superficial and unyielding. One judge writes that "judicial independence is an essential cornerstone of the rule of law,"[37] for reasons that a second judge explains: "[i]t is judicial independence that ensures that judges are free to honor their oaths, free to follow the Rule of Law, and free to dispense justice by a decision-making process, rather than an outcome-oriented process."[38] A third judge tells us there is a "vital relationship between judicial independence and the rule of law,"[39] in which, a fourth judge elaborates, independence enables a judge to decide cases "fairly, impartially, and according to the facts and law, not according to whim, prejudice, or fear, the dictates of the legislature or executive, or the latest opinion poll."[40] Justice Stephen Breyer has made the same point that "judicial independence revolves around the theme of how to assure that judges decide according to law, rather than according to their own whims or the will of the political branches of government."[41]

Why, then, is there a seeming disconnection between the rhetoric of what judges publicly say (that independent judges follow the law, without regard to their "whims"), and the reality of what judges less publicly acknowledge (we are not stupid—we know that the decisions of independent judges are influenced by their value preferences)? If upholding the rule of law is the primary, if not the sole justification judges offered for preserving their independence, then conceding that independent judges do more (or less) than uphold the law when they decide cases undercuts the primary justification for their independence. To the extent that judges acknowledge the influence of policy preferences in judicial decision making, then, it undermines the traditional legal model and plays into the hands of court critics who claim that "activist" judges abuse their independence by disregarding the law and "legislating from the bench" and must therefore forfeit their independence and be subject to greater political control. And so, judges intent on preserving their independence stick to a rule of law script.

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37. Samuel L. Bufford, *Defining the Rule of Law*, JUDGES J., Fall 2007, at 16, 20.

38. Julie A. Robinson, *Judicial Independence: The Need for Education About the Role of the Judiciary*, 46 WASHBURN L.J. 535, 544 (2007).

39. Louraine C. Arkfeld, *The Rule of Law and an Independent Judiciary*, JUDGES J., Fall 2007, at 12, 12.

40. Shirley S. Abrahamson, *Thorny Issues and Slippery Slopes: Perspectives on Judicial Independence*, 64 OHIO ST. L.J. 3, 3 (2003).

41. Stephen G. Breyer, *Judicial Independence in the United States*, 40 ST. LOUIS U. L.J. 989, 989 (1996).

Not very long ago, I wrote that if "judges employ law as a shill to conceal nakedly political decision making of a sort best reserved for Congress or the people, then insulating such decision making from the influence of Congress or the people becomes largely indefensible."[42] I stand by those words, at least in a qualified way, but they conjure the image of a judge that few (save an especially vested contingent of the political science community) would say is readily found in nature. In the minds of most, judicial decisions are influenced by law and personal preferences in complex and varying combinations. If, however, we proceed from the premise that judicial independence exists for the sole purpose of promoting the "rule of law," conventionally understood, then once it is conceded that independent judges do not simply follow the law, the rationale for judicial independence is diminished or obliterated. But is the premise sound? In other words, can judicial independence be defended in a world where the judge's personal values or policy preferences influence the decisions that a judge makes? It seems to me that it can, for a number of reasons.

First, to the extent that a judge's policy preferences merely color her interpretation of the law, the rule of law justification for judicial independence remains intact. For example, a conservative judge and a liberal judge may interpret the meaning of the freedom of speech in predictably different ways, but the textual weave of the law is open enough to accommodate such differing interpretations without doing violence to the proposition that both judges are doing their best to follow the law. In such scenarios, the judges in question are, from their point of view, interpreting the law as they construe it to be written.[43] Insulating these judges from external interference with the choices they make can thus be defended with reference to more traditional rule of law arguments. Granted, value preferences influence case outcomes, but the universe of possible outcomes is constrained and channeled by legal text and precedent that judicial independence protects against encroachment.

Second, to the extent that we propose to exercise greater political control over judges who sometimes follow the law and sometimes implement their preferences, the question becomes whether the benefit of curbing the independence of judges to implement their political preferences exceeds the cost of curbing their independence to uphold the rule of law in the teeth of political resistance. This scenario is slightly different from that

42. GEYH, *supra* note 32, at 281.
43. *See, e.g., id.* at 279.

posited in connection with the first point, because here we assume that judges sometimes knowingly depart from the rule of law to further their value preferences. The operative issue, then, is not whether the rule of law is all that matters to judges when they decide cases, but whether it matters enough to justify the retention of structural protections for judicial independence.

Third, upholding the rule of law is not the only instrumental value that judicial independence arguably furthers. Impartiality is another. The Model Code of Judicial Conduct defines impartiality as the "absence of bias or prejudice in favor of, or against, particular parties or classes of parties, as well as maintenance of an open mind in considering issues that may come before the judge."[44] Judicial independence buffers judges from external pressures that the political branches, the electorate, the media, interest groups, or even the parties might otherwise seek to impose. Such pressures could bias the judge against a party or cause and thereby impair the judge's capacity to adjudicate that case fairly. At the same time, judicial independence may liberate judges to act on their individual biases without fear of reprisal, to the detriment of impartiality. And so, one possibility is to ask whether the impartiality that judicial independence arguably facilitates offsets the partiality that it arguably insulates. Another possibility is to preserve judicial independence from external threats to impartiality while augmenting internal checks (such as appellate review, disqualification standards, and disciplinary processes) to discourage threats to impartiality posed by the judges themselves.

Fourth, and in a vein related to the preceding point, judicial independence may be defended as a means to further fair or due process.[45] As Professor Edward Rubin has explained, "Due process does not demand that decisions exclude public policy considerations or require that they flow logically and definitively from applicable rules. But it does demand a certain type of decision making, specifically decision making that is constrained by the established procedural protections."[46] Independence, the argument goes, "is a mechanism that is designed to ensure that a decision maker provides the due process protection of a decision on the record . . . by restricting various kinds of signals from various governmental units or private parties."[47] In other words, judicial independence ensures adherence to a fair process by

44. MODEL CODE OF JUDICIAL CONDUCT Terminology at 6 (2007).

45. Edward L. Rubin, *Independence as a Governance Mechanism*, *in* JUDICIAL INDEPENDENCE AT THE CROSSROADS, *supra* note 32, at 56, 70.

46. *Id.*

47. *Id.* at 71.

insulating that process from corruption by interested outsiders, regardless of whether the judges themselves slavishly adhere to formalistic rules or interpret the law more flexibly in light of their own policy preferences.

Fifth, judicial independence can be defended on the grounds that it promotes institutional competence. Unlike legislators and governors, judges of general jurisdiction in every state must, as a matter of constitutional or statutory law, be trained lawyers, often with a specified number of years in practice prior to ascending the bench.[48] The assumption implicit in such requirements is that the business of judging requires specialized training. To the extent that judges make "policy," it is policy made in the context of specific cases and controversies that is so closely intertwined with the interpretation of existing law that expertise in the law is needed to do the job well. Judicial independence arguably facilitates competent and conscientious decision making by enabling judges to ply their expertise unencumbered by excessive external interference.

Sixth, one can argue that judicial independence remains necessary to preserve public confidence in the courts. This argument can be advanced in either of two ways. First, public confidence in the institutions of government is an end in itself in democratic republics that depend for their legitimacy on the consent of the governed. The willingness of people in such republics to acquiesce to governmental control turns on whether they believe that their government is subject to the rule of law. To the extent that law continues to matter to judges—even if preferences matter too—judicial independence preserves public confidence in the capacity of the legal system to encourage the rule of law and eschew the rule of the mob or the politically powerful.[49] Second, and on a more cynical note, even if the rule of law is an absolute myth, and in reality judges exploit their independence by satiating their political appetites at every turn, it is still an important myth that preserves public confidence in the courts and thereby ensures acquiescence in the orderly administration of justice. Judicial independence, in turn, is a cornerstone in the rule of law myth that cannot be removed without destroying the myth that is critical to maintaining public order.[50]

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48. Charles Gardner Geyh, *Why Judicial Elections Stink*, 64 OHIO ST. L.J. 43, 59 n.71 (2003).

49. *See, e.g.*, Charles Gardner Geyh, *The Judgment of the Boss on Bossing the Judges: Bruce Springsteen, Judicial Independence, and the Rule of Law*, 14 WIDENER L.J. 885, 902–05 (2005).

50. *See, e.g.*, James Gibson, *Challenges to the Impartiality of State Supreme Courts: Legitimacy Theory and "New Style,"* JUD. CAMPAIGNS, Mar. 21, 2007, at 5–6

This has been a thought piece in which I do not presume or pretend to fully develop any particular justification for judicial independence. My point is simply to suggest the possibility that in a world where law and preferences both play a role in judicial decision making, judicial independence can still be defended on a variety of grounds. If such an argument is accepted, it may be possible to have more meaningful, interdisciplinary discussions about what judges do: to concede that preferences matter is not to concede that law is irrelevant or that judicial independence is anathema, which may liberate judges and lawyers to speak more openly and candidly about the complexity and nuance of the judicial role. That, in turn, may facilitate finding middle ground in ongoing debates over judicial selection, judicial speech, judicial disqualification, and judicial independence and accountability.

In other words, if we accept that the truth about what judges do is likely to involve law *and* preference, and that judicial independence may retain value in this middle ground, then it becomes possible to be less absolutist in other areas as well. For example, it may make more sense to talk about which judicial selection system is best suited to serve the needs of a given state with a given political culture at a given time than to assume one size fits all and argue that one selection system must be optimal for everyone.[51] When it comes to judicial speech, it may be possible to acknowledge that the public has a right and need to know about the personal, judicial, and political philosophy of prospective judges (because values matter in judicial decision making), at the same time future litigants have the right and need to know that their judges are not pre-committed to reaching particular results before they have had an opportunity to plead their cases (because law matters too). Through use of disqualification and recusal, judges can worry less about living up to the myth of perfect impartiality and concede occasional bias or apparent bias when it arises—to the ultimate benefit of public confidence in the courts. And in the general debate about judicial independence and accountability, it may enable discussions to proceed as

(discussing the "rule of law myth" and its relationship to public confidence in the courts).

51. The middle ground I am seeking here represents a departure from the more strident position I took in categorical opposition to judicial elections several years ago. *See* Geyh, *supra* note 49. Although I remain skeptical of judicial elections as a general matter, I am less interested in being doctrinaire than being right, and have concluded that divining the optimal method of judicial selection is best undertaken when considering a specific jurisdiction in light of its specific problems and political culture.

less of a zero-sum game and rather as one in which independence and accountability are both welcome in measures dictated by the problems and needs of the given jurisdiction.